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SUPREME COURT, U.S.
FILED

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Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

CHRISTINE SOLEM
and
JOHN COLES,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Court ruled in Camara v. Municipal Court, 387 U.S. 523 (1967) that home occupants have a constitutional right to insist that government inspectors obtain a warrant to search, and may not constitutionally be convicted for refusing to consent to the inspection. The questions presented are:

1. Whether a legitimate home occupant's refusal to permit entry of government agents into her home for an administrative inspection constitutes a valid offense and probable cause for the issuance of a criminal search warrant to search it.

2. Whether the home occupants' Fourth Amendment rights are violated when the state uses evidence obtained in such search to prosecute and convict them of offenses unrelated to such refusal.

TABLE OF CONTENTS

1. Questions Presented for Review.....

2. Table of Cited Authorities.....

3. Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in the Case.....1

4. Statement of the Basis for Jurisdiction in this Court.....1

5. Constitutional Provisions and Statutes Involved in the Case.....1

6. Concise Statement of the Case.....4

7. Argument for Allowance of the Writ..18

8. Conclusion.....29

9. Signature.....30

TABLE OF CITED AUTHORITIES:

Constitutions:

U.S. Const., Amend. IV, 1, 11, 18

U. S. Const., Amend. XIV, 2, 18

U.S. Const., Amend., V, 2, 26

Statutes:

Ch. 24 of Title 19.2 of the Code of Virginia, Inspection Warrants, 24

V.C. sec. 3.1-368, 4, 11, 13, 23, 23

V.C. sec. 3.1-381, 4, 23

V.C. sec. 3.1-387, 2

V.C. sec. 3.1-388, 2

V.C. sec. 3.1-388(a), 11, 13, 23

V.C. sec. 3.1-388(e), 7, 9, 20, 24, 27

V.C. sec. 3.1-390(a), 3, 23

V.C. sec. 3.1-395, 4

V.C. sec. 3.1-398.1, 3, 8, 20

V.C. sec. 3.1-399, 2, 10, 12, 20, 21, 22

V.C. sec. 3.1-418, 3, 20

V.C. sec. 17.1-410, 4, 17

V.C. sec. 18.2-11, 3, 23

V.C. sec. 18.2-12, 3, 23

V.C. sec. 19.2-393, 3, 24

V.C. sec. 19.2-394, 3, 24

V.C. sec. 19.2-395, 3, 24

V.C. sec. 19.2-396, 3, 24, 25

V.C. sec. 19.2-397, 4, 24

V.C. sec. 19.2-52, 3

V.C. sec. 19.2-53, 3

V.C. sec. 19.2-54, 3, 6

V.C. sec. 19.2-56, 3, 6

V.C. sec. 19.2-57, 6

V.C. sec. 19.2-59, 3

Case Authorities:

Camara v. Municipal Court,
387 U.S. 523 (1967), 12, 18

Doyle v. Ohio,
426 U.S. 610 (1976), 26

Frank v. Maryland,
359 U.S. 360 (1959), 18

Gardner v. State,
566 S.E.2d 329, 332 (Ga. App. 2002),
17, 25

Harlow v. Fitzgerald,
457 U.S. 800, 818 (1982), 27

Illinois v. Gates,
462 U.S. 212 (1983), 15

Illinois v. Krull,
480 U.S. 340, 355 (1987), 27
480 U.S. 340 (1987), 12

McCrary v. Commonwealth,
242 Va. 413, 321 S.E.2d 637 (1984), 20

Miranda v. Arizona,
384 U.S. 436 (1966), 26

See v. City of Seattle,
387 U.S. 541 (1967), 18

United States v. Leon,
468 U.S. 897 (1984), 13, 22

Whitley v. Warden,
401 U.S. 560 (1971), 20

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE.

There is no written opinion in the case by the Virginia Supreme Court. The opinion of the Court of Appeals of Virginia is unpublished, and hence not in an official or unofficial reporter.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT.

A. Date the order sought to be reviewed was entered: October 9, 2003.

B. Date of any order respecting a rehearing: January 30, 2004.

C. Express reliance on Rule 12.5: not applicable.

D. Statutory provision believed to confer on this Court jurisdiction to review the on a writ of certiorari the judgment or order in question: 28 U.S.C. sec. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:

U.S. Const., Amend., IV, "The right of the people to be secure in their persons,

houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Amend., V, "No person... shall be compelled in any criminal case to be a witness against himself[.]"

U. S. Const., Amend. XIV, "[N]or shall any state deprive any person of life, liberty, or property without due process of law..."

Virginia Code (1950) ["V.C."] section ["sec."] 3.1-399

V.C. sec. 3.1-387, "For the purpose of this article:

(1) The term "Commissioner" means the Commissioner of Agriculture and Consumer Services...

...

(3) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."

V.C. sec. 3.1-388, "The following acts and the causing thereof within the Commonwealth are hereby prohibited:

(a) The manufacture, sale, or delivery, holding or offering for sale of any food that is adulterated or misbranded.

...

(e) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by sec. 3.1-399."

V.C. sec. 3.1-390(a), "Any person who violates any of the provisions of 3.1-388 shall be guilty of a misdemeanor and shall on conviction thereof be punished in the manner provided by law for the punishment of misdemeanors..."

V.C. sec. 3.1-398.1

V.C. sec. 3.1-418

V.C. sec. 18.2-12, "A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor."

V.C. sec. 18.2-11, "The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both..."

V.C. sec. 19.2-52

V.C. sec. 19.2-53

V.C. sec. 19.2-54

V.C. sec. 19.2-56

V.C. sec. 19.2-59

V.C. sec. 19.2-393

V.C. sec. 19.2-394

V.C. sec. 19.2-395

V.C. sec. 19.2-396

V.C. sec. 19.2-397

V.C. sec. 3.1-368, "Food in the process of manufacture, preparation, packing, storing, sale or distribution, must be securely protected from flies, dust, dirt and as far as may be necessary, from all other foreign or injurious contamination..."

V.C. sec. 3.1-381, "Any person, firm, corporation or association violating any of the provisions of the preceding sections of this article [Art. 2, including 3.1-368] shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than $25 nor more than $300."

V.C. sec. 3.1-395

V.C. sec. 17.1-410

CONCISE STATEMENT OF THE CASE

James A. Morano, Jr. ("Morano"), a Review and Compliance Officer with the Virginia Department of Agriculture and Consumer Services ("VDACS"), received information that on June 19, 1999, an individual identifying himself as John Coles had sold goats cheese to Joe Fabri-

zio and Laurie Malony, they then being food inspectors with VDACS, at the Farmers' Market in Charlottesville, Virginia, and that he resided at 1836 Polo Grounds Road, Charlottesville. On June 22, 1999, Gerald Williams, a State Food Safety Specialist with VDACS, and Ralph Ollinger, a VDACS Inspector, with no search warrant or other warrant, drove to 1836 Polo Grounds Rd., Satyrfield Farm. They turned off the paved highway onto a winding dirt, gravel road running through woods which was on the property leading to the residence, which sits on 10 acres.

Williams admitted there had been no complaint regarding the goat cheese, Solem or Coles, or the property. The inspectors gave no advance notice they would be coming. They approached the residence, which is not visible from the highway due to woods, and walked up to the back door of the home.

One knocked on the door. Solem, who was inside, in the middle of an exercise tape, dressed in a black leotard, went to the door and opened it. The agents said they were there to inspect her kitchen.

Solem went out onto the back steps, shutting the door behind her. After verifying there had been no complaint about her cheese, she explained she did not believe she could be subjected to a warrantless entry, and would not allow it. There was some arguing over whether the agents could inspect without a warrant, but they then left.

Later that day, Morano swore out an affidavit to Magistrate Carolyn P. Peyton, who issued a traditional criminal search warrant to search the above residence. The affidavit and warrant appear on a form which is based on Virginia Code sections 19.2-54, 56, 57 (and now deleted

Va. Sup. Ct. Rule 3A:27), the form portions of which appear below in bold face type, and the handwritten portions in the affidavit, and typed portions in the warrant, appear in regular type:

APPLICANT:
James A. Morano, Jr., Review and Compliance Officer, Va. Dept. of Agriculture & Consumer Services, Office of Dairy and Foods, 1100 Bank St., Richmond, VA 23219

AFFIDAVIT FOR SEARCH WARRANT
The undersigned Applicant states under oath:
1. A search is requested in relation to an offense substantially described as follows: Refusal to permit entry of agents of the Commissioner of Agriculture and Consumer Services for the purpose of inspection and the taking of a food sample. Va. Code 3.1-388(e)

2. The place, person, or thing to be searched is described as follows: Satyrfield Goat Farm, 1836 Polo Grounds Road, Charlottesville, VA (in Albemarle County). A faded masonite board two story residence and surrounding barns used for milking goats and/or storage of food products, food ingredients and/or food processing equipment.

3. The things or persons to be searched for are described as follows: All food processing and manufacturing equipment, food contact surfaces, food processing & control records and documents, food storage equipment, food refrigeration

equipment, hand washing sinks, equipment sinks, rest rooms, water supplies, food labels and raw materials & ingredients used or relating to the manufacture, processing and/or offering for sale of goats cheese.

4. The material facts constituting probable cause that the search should be made are: Offering for sale food products at the Charlottesville Farmers Market on June 19, 1999 by an individual identifying himself as John Cole residing at 1836 Polo Grounds Road, Charlottesville, VA (in Albemarle County) without being inspected by the Commissioner of Agriculture and Consumer Services as required by law. Va. Code 3.1-398.1.

5. The object, thing or person searched for constitutes evidence of the commission of such offense.

6. [ ] I have personal knowledge of the facts set forth in this affidavit OR

[X] I was advised of the facts set forth in this affidavit, in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts: Goats cheese offered for sale by an individual identifying himself as John Cole at the Charlottesville Farmers Market on June 19, 1999, goats cheese was purchased by Inspector Joe Farizio and Inspector Laurie Malony, agents of the Commissioner of Agriculture and Consumer Services.

The statements above are true and accurate to the best of my knowledge and belief.

[signature] John A. Morano, Jr.

Subscribed and sworn to before me this day.
6/22/99 11:56 a.m. [signature] Carolyn P. Peyton, Magistrate.

SEARCH WARRANT
COMMONWEALTH OF VIRGINIA In re/V. Christine Solem

SEARCH WARRANT
[X] To any policeman of a county, city or town:
[ ] To _____

You are commanded in the name of the Commonwealth forthwith to search either in the day or night Satyrfield Goat Farm, 1836 Polo Grounds Rd., Charlottesville, VA (Albemarle Co.). A faded masonite board two story residence and surrounding barns used for milking goats and/or storage of food products, food ingredients and/or food processing equipment **for the following property, objects and/or persons:** [here is typed the identical items listed in the affidavit, par. 3].

You are further commanded to seize said property, persons, and/or objects if they be found and to produce before the Albemarle Circuit Court **Court an inventory of all property, persons, and/or objects seized.**

This search warrant is issued in relation to an offense substantially described as follows: Refusal to permit entry of agents of The Commissioner of Agriculture and Consumer Services as provided by [here follows "3.1-388(e)" with a line

drawn through it followed by the handwritten initials "CPP" after which appears in handwriting, "3.1-399 CPP."

I, the undersigned, have found probable cause to believe that the property or person constitutes evidence of the crime identified herein or tends to show that the person(s) named or described herein has committed or is committing a crime, and further that the search should be made, based on the statements in the attached affidavit sworn to by James A. Morano, Jr., **Name of Affiant.**

6/22/99 12:14 p.m. [signature] Carolyn P. Peyton **Carolyn P. Peyton, Magistrate**

The warrant was put in the hands of Karl Mansoor, an Albemarle police officer, who proceeded to execute it in the company of Williams and Ollinger. They went into the kitchen and other parts of the house, opened drawers, and took photographs. They seized goats' cheese that they found therein.

Their Search Inventory and Return lists as items seized containers of goat cheese and a sealed container of well water, and is signed by K. E. Mansoor, executing officer. Based upon the afore-

said observations and seizures during the search, summons were issued against each defendant herein in the Albemarle County general district court charging inter alia failure to secure food properly at the residence in violation of V. C. sec. 3.1-368, and manufacturing adulterated food at the residence in violation of V.C. sec. 3.1-388(a). Defendants, pro se, were convicted of the above 2 charges, and then appealed to the Albemarle County Circuit Court for a trial de novo.

The Commonwealth conceded that licensure is not required for a person who makes goats cheese and sells it. Solem and Coles, still pro se, filed a written motion to suppress the results of the search as being in violation of the Fourth Amendment (Record p. 90, 101). In that motion, defendants wrote,

> 12. However, refusal to allow State agents to enter one's home without a warrant is not an "offense."

In support thereof, they cited Camara v. Municipal Court, 387 U.S. 523 (1967).

The further contended that the affidavit was so "facially deficient and lacking in indicia of probable cause so as to render official belief in their existence entirely unreasonable." They claimed there was no relation between the material facts constituting probable cause and the items to be searched, and the magistrate served as a "rubber stamp" for the affiant's conclusions.

The Commonwealth asserted that even if sec. 3.1-399 is unconstitutional, a search warrant based thereon is not invalidated simply due to a subsequent finding that the offense cited as the basis for the search is unconstitutional, citing Illinois v. Krull, 480 U.S. 340 (1987). Also, it contended that even if the search warrant was defective, there

was good faith reliance under United States v. Leon, 468 U.S. 897 (1984), so suppression should not be ordered.

Hearing was held before the circuit court on August 29, 2000, and August 30, 2000. The Court stated it would overrule the motion to get the whole case before the court and then revisit the motion after all the evidence was in. The Court in a letter ruling dated November 29, 2000, denied all defendants' motions, without explanation.

At the trial, the Commonwealth introduced into evidence photographs of the interior of the house taken during the search, laboratory analyses of goats' cheese seized during the search, and testimony of what the agents observed during the search, which was the sole evidence to obtain the convictions. The Court found each defendant guilty of a 3.1-368 violation and a 3.1-388(a) viola-

tion, and imposed a $100 fine on each.

Defendants pro se appealed to the Virginia Court of Appeals, arguing "the 'offense' listed [in the search warrant] is not an 'offense' when a private home is involved[,]" (pet. for appeal, p. 5) citing Camara, that the warrant did not recite a valid offense, that the warrant/affidavit were lacking in probable cause and facial cohesion, and that Leon good faith did not apply. After being awarded an appeal, they reiterated these contentions in their opening brief. In its brief, the Commonwealth wrote, "In sum, the refusal to allow Agriculture Department agents to conduct warrantless inspections of a residence being used, like the defendants', as a food producing business is a valid and constitutional offense, Camara notwithstanding."; it also argued Leon good faith applied to prevent suppression.

In an unpublished Memorandum Opinion dated October 15, 2002, by the Honorable G. Steven Agee, a panel affirmed the judgment. First, it ruled that the warrant stated a valid offense. Judge Agee wrote that the warrantless search authorized by sec. 3.1-399 was reasonable, and that the goat cheese operation was subject to warrantless search.

The Court ruled that when Solem then refused entry, the warrant stated a valid offense. It wrote,

> [T]he procedure followed by the Department in this case was exactly that prescribed by the United States Supreme Court in Camara. 'Warrants should normally be sought only after entry is refused...' Camara, 387 U.S. at 539.

(Op. p. 6, n. 2).

On the issue of whether the warrant was issued on probable cause, it cited Illinois v. Gates, 462 U.S. 212 (1983) for the definition of probable cause (Op. 6). Judge Agee then wrote,

In this case, the magistrate was informed that agents of the Department observed Coles sell goat cheese in a public market on June 19, 1999; that the goat cheese was being sold without prior inspection by the Department, in violation of Code sec. 3.1-398.1; that Coles resided at Satyrfield farm and that agents of the Department had been refused entry to inspect at Satyrfield Farm. These facts provided the magistrate with probable cause to believe Satyrfield Farm was subject to inspection and entry had been denied in violation of Code sec. 3.1-388(e). The things to be searched would provide evidence that Satyrfield Farm was producing goat cheese for sale to the public and was, therefore, subject to inspection which should not have been refused.

(Op. 7-8). It thus made no Leon finding.

Solem and Coles filed a combined petition to rehear and petition for rehearing en banc. The Court denied such petitions. Solem and Coles then engaged undersigned counsel who appealed to the Virginia Supreme Court.

In his petition for appeal, undersigned contended, "[T]here was an utter absence of any evidence from which a reasonable magistrate could conclude

probable cause..." (Pet. 24). He further argued that even if the affidavit had alleged a "refusal" to permit a warrantless search of a residence, such could not constitutionally be considered as a basis for the issuance of a search warrant, citing Gardner v. State, 566 S.E.2d 329, 332 (Ga. App. 2002) (Pet. 28). The Commonwealth filed a Brief in Opposition, and Motion to Dismiss, arguing that under V.C. sec. 17.1-410, which makes decisions of the Va. Court of Appeals final where no jail time is imposed, except where the matters involve substantial constitutional questions or matters of significant precedential value, there was no jurisdiction.

The Va. Supreme granted the motion to dismiss on those grounds by an order dated October 9, 2003. Rehearing was denied by order dated January 30, 2004. By order dated March 17, 2004, such Court

deferred forwarding of its mandate while proceedings are pending in this Court.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In the companion cases of Camara v. Municipal Court, 387 U.S. 523 (1966), and See v. City of Seattle, 387 U.S. 541 (1967), this Court reversed Frank v. Maryland, 359 U.S. 360 (1959), and ruled that "administrative searches" were subject to the requirements of the Fourth Amendment, U.S. Const., Amend. IV, which is applicable to the states through the Due Process Clause. U.S. Const., Amend. XIV. In Camara, this Court ruled that Roland Camara, against whom complaint had been made that he was living in the back of his store, which had been commercially leased on the ground floor of an apartment building, could not criminally be

prosecuted under San Francisco Housing Ordinance sec. 507 for refusing a warrantless inspection authorized by sec. 503. In See, the Court ruled that Norman See could not be criminally prosecuted for refusing a warrantless inspection of his commercial warehouse.

This Court, however, has never ruled whether such a refusal, when such is the sole basis for obtaining a traditional criminal search warrant, may be considered by a magistrate in determining whether "probable cause" exists to issue such a warrant. This case provides this Court with an opportunity to rule whether such bare refusal alone may furnish grounds for the issuance of a criminal search warrant, and, if one is issued, whether suppression of the evidence obtained thereby is required as a matter of federal constitutional law.

Preliminarily, however, it is appar-

ent that the affidavit is lacking in numerous essentials for the obtaining of a search warrant based on a "refusal" offense, whether such be considered an offense under V.C. sec. 3.1-388(e), V.C. sec. 3.1-399 combined with V.C. sec. 3.1-418, or V.C. sec. 3.1-398.1 combined with 3.1-418.[1] It contains no express averment that Solem, or anyone else, actually refused admittance. It doesn't state the date that any person went to the resi-

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1. Virginia law, like the law of this Court, requires an examination of the "four corners" of the affidavit to determine if the requisite probable cause for issuance of the warrant exists, McCrary v. Commonwealth, 242 Va. 413, 321 S.E.2d 637 (1984), citing Whitley v. Warden, 401 U.S. 560 (1971), altough "an insufficient affidavit may be supplemented or rehabilitated by information disclosed to the issuing magistrate upon application for the search warrant." McCrary at 228 Va. 231. No contention was made in this case that the magistrate considered any evidence aliunde the affidavit in making her determination there was probable cause to believe a "refusal" offense had occurred.

dence; it doesn't state that Williams, Ollinger or any other person went there; it doesn't state that someone knocked on the door, and that Solem answered and came to the door; and it doesn't state that the person knocking identified himself as a VDACS agent, and that he demanded right of warrantless entry under authority of V.C. sec. 3.1-399 or any other provision of law. "Refusal" is only an offense when made at a food manufacturing plant, and, assuming arguendo the averment of John Coles selling goats cheese at the Farmers Market and living at 1836 Polo Grounds Rd., gave reason to believe such was, indeed, a food manufacturing plant, this affidavit is plainly a "bare bones" affidavit with respect to any offense of "refusal."

There is thus absolutely no indicia whatsoever that a "crime" occurred on the back steps of the residence, such that a

search was proper to obtain proof that the refusal occurred at a food manufacturing plant. The affidavit, being bare bones, is insufficient to support probable cause of a "refusal" offense, and hence there cannot be "good faith" under United States v. Leon, 468 U.S. 897 (1984), to preclude suppression of the results thereof.

Nevertheless, defendants will assume for purposes of argument that the affidavit is sufficient to warrant a reasonable magistrate in believing that there had been a refusal to submit to a warrantless inspection by Solem of her home sought by a VDACS officer, identifying himself as such in the course of his duties, under authority of V.C. sec. 3.1-399. Notwithstanding, there is not the slightest indication in the affidavit that any evidence exists in the home to support the charges of which defendants were

ultimately convicted, V.C. sec. 3.1-368 and V.C. sec. 3.1-388(a), or some criminal offense other than the refusal itself.[2] There is nothing to suggest, for example, that Coles's goats' cheese was impure, fly laden, dirty, or adulterated, from which the affiant sought to induce the magistrate to believe there would be conditions for making cheese in the home that were unsanitary, in violation of some criminal code section.

In Camara, this Court moreover ruled that the "probable cause" which might furnish the basis for a warrant to search by a government inspector need not be the

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2. A violation of V.C. 3.1-368 is made a misdemeanor punishable by a fine of $25 to $100 by V.C. sec. 3.1-381. A violation of V.C. sec. 3.1-388(a) is made a misdemeanor by V.C. 3.1-390(a). Under V.C. sec. 18.2-12, any misdemeanor for which no punishment is prescribed is a Class 1 misdemeanor, and under V.C. sec. 18.2-11, a Class 1 misdemeanor is punishable by jail time up to 12 months, a $2,500 fine, either or both.

same as that used to furnish the basis for a traditional search warrant. 387 U.S. 534. It stated "reasonable legislative or administrative standards" might furnish a basis for a warrant with respect to a particular dwelling. Id. at 538. In apparent response to such, the Virginia General Assembly in 1976 adopted Ch. 24 of Title 19.2 of the Code of Virginia, Inspection Warrants, consisting of V.C. sec. 19.2-393, V.C. sec. 19.2-394, V.C. sec. 19.2-395, V.C. sec. 19.2-396, and V.C. sec. 19.2-397.

Faced with the refusal, purported to be a violation of criminal statute 3.1-388(e), a statute adopted one year prior to Camara, the VDACS agents, however, did not seek an administrative inspection warrant under Ch. 24, asserting that reasonable legislative or administrative standards were satisfied with respect to the dwelling. Had they done so, Solem

and Coles would have been entitled to 24 hour notice that a warrant had been issued under V.C. sec. 19.2-396, unless the issuing judge had found "that there is a reasonable suspicion of an immediate threat to public health or safety." Instead, the inspectors sought a traditional criminal search warrant based on the theory that the refusal itself was "an offense."

Defendants contend that such refusal alone at a home, even if reasonably believed to be a food manufacturing establishment, cannot furnish the basis for issuing a criminal search warrant. In the only precedent which undersigned can locate directly on point, the Court of Appeals of Georgia so ruled in the case of Gardner v. State, 566 S.E.2d 329, 332 (Ga. App. 2002):

> It was error for the magistrate to consider the Gardners' refusal to consent to a search of their residence as part of

the basis for the issuance of the search warrant in this case. Refusing consent to search was the Gardners' right, and "[w]e decline to view the exercise of a constitutional right as a factor in determining probable cause." Thus, the trial court's determination that refusal to consent to a search may be taken into account when determining probable cause is error as a matter of law.

This Court has, in other contexts, ruled that the exercise of a constitutional right, not only may not be the basis of a criminal prosecution, but may not be used in other ways. For example, this Court has ruled that when one exercises the right under the Fifth Amendment to say, in response to police interrogation, "I do not wish to speak," such may not be used as evidence against him at trial, Miranda v. Arizona, 384 U.S. 436 (1966), nor may it be used to impeach an explanation offered at trial. Doyle v. Ohio, 426 U.S. 610 (1976).

At the time of the refusal herein, no Virginia appellate court had ruled wheth-

er 3.1-388(e), incorporating 3.1-399, and adopted one year prior to Camara, violated the Fourth Amendment by criminalizing refusal to submit to warrantless searches. Defendants believe they have a right to refuse a search of their home under Camara, whether the constitutionality of the statute which is the basis of the search warrant has been ruled upon by the Virginia Supreme Court or her intermediate appellate court or not. Solem's refusal was the exercise of "clearly established... constitutional rights of which a reasonable person would have known." Illinois v. Krull, 480 U.S. 340, 355 (1987), quoting from Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In this case, the Virginia Supreme Court dismissed the petition for appeal because it found there not to be a substantial constitutional question. If this be true, then Fourth Amendment

protection of the home has been seriously eroded. This Court must take this case to protect the privacy of the home in cases where the government does not have probable cause to believe any "crime" occurred, other than the putative "crime" of refusal to admit entry to the home, and then, without seeking an administrative inspection warrant, seeks to make the refusal a basis for a criminal search warrant. If all it takes for the government to obtain a criminal search warrant of a home is a refusal to admit a government inspector into that home when he has no warrant, there is actually no protection of the home because the inspector can simply ask for consent to search, and, when such is refused, obtain a search warrant and then conduct a forcible search.

While this Court recognized Camara's constitutional right to refuse admit-

tance, it was concerned that an inspector might never be able to inspect if the traditional criminal standard of "probable cause" for a particular crime was the sole standard for obtaining a warrant. Hence, it recognized the right to obtain one when reasonable legislative or administrative standards were satisfied with respect to a particular dwelling. When the inspector, however, attempts to treat the refusal itself as a "crime," and seeks a criminal search warrant based on such putative "crime," he does not follow "exactly" "the procedure" "prescribed by the United States Supreme Court in Camara," as claimed by the Virginia Court of Appeals, which plainly erred in so ruling.

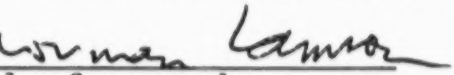
CONCLUSION

The affidavit is "bare bones" as to any averments of a "refusal" offense, could not support probable cause for

issuance of a criminal search warrant in relation thereto, and evidence obtained thereunder must be suppressed. Even if the affidavit provided an inference of a "refusal," Solem had the clearly established right to refuse to submit to a warrantless inspection of her home, and the magistrate could not consider such as an "offense," and hence a reason for searching it. The evidence should be ordered suppressed, and, as there is no evidence supporting the convictions aliunde that obtained in the search, the convictions should be reversed and dismissed.

Respectfully submitted,

CHRISTINE SOLEM and JOHN COLES

By 
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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Docket Number

THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

CHRISTINE SOLEM
and
JOHN COLES,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Norman Lamson
Counsel of record for
petitioners
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CONTENTS OF APPENDIX

1. Order of the Va. Supreme Court denying rehearing dated January 30, 2004.....1

2. Order of the Va. Supreme Court dismissing petition for appeal dated October 9, 2003.....2

3. Order of the Va. Supreme Court deferring issuance of mandate dated March 17, 2004.....4

4. Memorandum Opinion of the Honorable G. Steven Agee of the Va. Court of Appeals dated October 15, 2002, affirming the convictions.....6

5. Order of Va. Court of Appeals dated January 16, 2003, denying rehearing.....21

6. Order of Va. Court of Appeals dated January 16, 2003, denying rehearing en banc.....22

7. Letter of Judge Snead denying motion to suppress dated November 29, 2000.....24

8. Order of Albemarle Circuit Court of 10/30/01, denying motion to to suppress.....25

9. Statutes involved in the case.....26

Virginia Code ["V.C."], section ["sec."] 3.1-399, Commissioner to have access to factories, warehouses and other places; examination of samples.....26

V.C. sec. 3.1-398.1, Inspections required to operate food establishment.....27

V.C. sec. 3.1-418, Punishment for failure to comply with requirements of title.....28

V.C. sec. 17.1-410, Disposition of appeals, finality of decisions..29

V.C. sec. 19.2-52, When search warrant may issue.....30

V.C. sec. 19.2-53, What may be searched and seized.....30

V.C. sec. 19.2-54, Affidavit preliminary to issuance of search warrant; general search warrant prohibited; effect of failure to file affidavit.....31

V.C. sec. 19.2-56, To whom search warrant directed; what it shall command; warrant to show date and time of issuance; copy of affidavit to be part of warrant and served therewith; warrants not executed within fifteen days.....32

V.C. sec. 19.2-59, Search without warrant prohibited; when search without warrant lawful.....36

V.C. sec. 19.2-393, Definitions....36

V.C. sec. 19.2-394, Issuance of warrant.....39

V.C. sec. 19.2-395, Duration of warrant.....41

V.C. sec. 19.2-396, Conduct of inspection, testing or collection of samples for testing; special procedure for dwelling.....42

V. C. sec. 19.2-397, Refusal to permit authorized inspection.....43

V.C. sec. 3.1-395, When food deemed adulterated.....43

10. Motion to Suppress of Solem in the Albemarle Circuit Court (less exhibits except for Inventory).....45

11. Motion to Suppress of Coles in the Albemarle Circuit Court.....52

12. Portions of Brief of Solem and Coles in Support of their Motion to Suppress in Albemarle Circuit Court (to show raising of federal question).....55

13. Portions of Transcript of Hearing on Motion to Suppress.....57

14. Portions of Solem and Coles' Petition for Appeal to Va. Court of Appeals (to show raising of federal question).....64

15. Portions of Solem and Coles' petition for appeal to the Va. Supreme Court (to show raising of federal question).....66

16. Summons Charging John Coles under V.C. sec. 3.1-368.....72

17. Summons Charging John Coles under V.C. sec. 3.1-388(a).....74

18 Summons Charging Christine Solem under V.C. sec. 3.1-368.....76

19. Summons Charging Christine Solem under V.C. sec. 3.1-388(a).....78

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of January, 2004.

Christine Solem, et. al., Appellants,

against Record No. 030389
Court of Appeals No. 1618-01-2

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On Consideration of the petition of the appellants to set aside the judgment rendered herein on the 9th day of October, 2003 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Agee took no part in the consideration of this case.

A copy,

Teste: [signed]

Clerk

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of October, 2003.

Christine Solem, et. al., Appellants,

against Record No. 030389
Court of Appeals No. 1618-01-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court grants the appellee's motion to dismiss and dismisses the petition for appeal filed in the above-styled case. Code sec. 17.1-410(A)(1) and (B).

Justice Agee took no part in the consideration of this case.

A copy,

Teste:

Patricia H. Krueger, Clerk

By: [signed]

Deputy Clerk

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 17th day of March, 2004.

Christine Solem, et. al., Appellants,

against Record No. 030389
Court of Appeals No. 1618-01-2

Commonwealth of Virginia, Appellee.

Order Deferring Issuance of Mandate

Upon consideration of the motion of the appellants, by counsel, it is ordered that the issuance of the mandate entered herein October 9, 2003 be and the same hereby is deferred, to and including the 30th day of April, 2004, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court.

A copy,

Teste: [signed]

Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, Clements and Agee
Argued at Richmond, Virginia

UNPUBLISHED

CHRISTINE SOLEM AND
JOHN COLES

v. Record No. 1618-01-2

MEMORANDUM OPINION* BY JUDGE G. STEVEN AGEE
OCTOBER 15, 2002

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY

Rayner V. Snead, Judge Designate

Christine Solem (John Coles, pro se, on briefs).

Richard B. Smith, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee

Christine Solem (Solem) and John Coles (Coles) were convicted in the Circuit Court of Albemarle County of

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*Pursuant to Code sec. 17.1-413, this

opinion is not designated for publication.

"[f]ail[ing] to securely protect food in the process of manufacture or storage from contamination by flies, dust, dirt or other injurious contamination," in violation of Code sec. 3.1-368, and the "[m]anufacture, sale, delivery, holding or offering for sale food that is adulterated," in violation of Code sec. 3.1-388(a). Both Solem and Coles were each ordered to pay fines totalling $200. On appeal, Solem and Coles contend the trial court erred by denying their motions to suppress certain evidence. Specifically, they contend the search warrant (1) did not recite a valid offense; (2) was issued without probable cause; and (3) was issued based on observations illegally obtained. For the following reasons, we find the trial court did not err and affirm the convictions.

I. STANDARD OF REVIEW

In reviewing a trial court's denial of a motion to suppress, "[t]he burden is upon [appellants] to show that this ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error." Fore v. Commonwealth, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980). "Ultimate questions of reasonable suspicion and probable cause to make a warrantless search" involve issues of both law and fact and are reviewed de novo on appeal. See Ornelas v. United States, 517 U.S. 690, 691 (1996). "In performing such analysis, we are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them[,] and we give due weight to the inferences drawn from those facts by resident judges and local law

enforcement officers." McGee v. Commonwealth, 25 Va.App. 193, 198, 487 S.E.2d 259, 261 (1997) (en banc) (citation omitted).

II. THE WARRANT STATED A VALID OFFENSE

Code sec. 3.1-399 grants agents of the Commissioner of the Department of Agriculture and Consumer Services (the Commissioner) free access

> to any factory, warehouse, or establishment in which foods are manufactured, processed, packed, or held for introduction into commerce... or any store, restaurant or other place in which food is being offered for sale, for the purpose... [o]f inspecting such [place]... to determine if any of the provisions of [Title 3.1, article 3] are being violated...

"The refusal to permit entry or inspection..., as authorized by [Code] sec. 3.1-399" is prohibited. Code sec. 3.1-388(e).

The Department's agents found on June 19, 1999 that goat cheese ostensibly produced at Satyrfield Farm was offered

for sale to the public and sought to inspect the production and storage area at the farm pursuant to Code sec. 3.1-399. Solem refused the agents entry to conduct an inspection. The agents then sought a search warrant that would authorize the search in light of the refusal, which they believed was in violation of Code sec. 3.1-388(e).

Solem and Coles contend the warrant issued does not cite a valid offense applicable to them because their goat cheese operation took place within their home and on its accompanying property. Because it was their private home, Solem contends she was constitutionally permitted to refuse entry for a warrant-less search, regardless of the commercial application for which the residence was used. Solem cites the United States Supreme Court decision in Camara v. Municipal Court, 387 U.S. 523 (1967), to

support her position.

While warrantless searches of a private home are prohibited, warrantless inspections may be allowed when there is a "pervasively regulated industry" involved. The "pervasively regulated industry" exception to the warrant requirement permits reasonable warrantless inspections of commercial enterprises engaged in closely regulated businesses. See Donovan v. Dewey, 452 U.S. 594, 600 (1981); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). Where governmental interests are furthered by regulatory inspections, a warrantless inspection does not violate the Fourth Amendment, so long as the search is reasonable. See Donovan, 452 U.S. at 600.

Enterprises that supply dairy products for human consumption in the Commonwealth constitute a "pervasively

regulated industry."[1] This is not an unknown concept to the appellants, based on prior litigation experience involving the Commonwealth's regulation of goat products as part of its regulation of the dairy industry. See generally Kenley v. Solem, 237 Va. 202, 375 S.E.2d 532 (1989); Carbaugh v. Solem, 225 Va. 310, 302 S.E.2d 33 (1983). Solem and Coles were notified by the Commissioner that they were subject to the laws and

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1. In Commonwealth v. Stratford Packing Co., 200 Va. 11, 104 S.E.2d 32 (1958), the Supreme Court of Virginia held that it is "'inherent in the plenary power of the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society.'" Id. at 16, 104 S.E.2d at 36 (citation omitted). Regulations governing the Commonwealth's food supply are justified by the state's interest in the "protection of its food supply." Id.. The General Assembly has charged the Commissioner and the Department with the duty to "inquire carefully into the dairy and food and drink products... which are manufactured or sold, or exposed or offered for sale in this Commonwealth." Code sec. 3.1-402.

regulations applicable to food production enterprises if they chose to produce goat cheese for sale. They were notified that inspections would be performed. Therefore, provided the parameters for a warrantless inspection are reasonable, a warrantless inspection upon the premises of a dairy product enterprise is permissible. By entering into their commercial goat cheese enterprise, Solem and Coles have subjected themselves to the law and regulations of the Commonwealth governing the production and sale of food products and cannot shield themselves from compliance by simply producing their product in the kitchen of their home.

We find the warrantless search authorized by Code sec. 3.1-399 to be reasonable. The reasonableness of a warrantless search depends upon the specific enforcement needs and privacy guarantees of each statute. Marshall v.

Barlow's, Inc., 436 U.S. 307, 321 (1978). The authority to conduct a warrantless inspection pursuant to Code sec. 3.1-399 is restrictive. A warrantless inspection is permitted only in those places where "foods are manufactured, processed, packed, or held for introduction into commerce... or [the] place in which food is being offered for sale." Code sec. 3.1-399. In this case, a warrantless inspection would have been permitted only in those areas of the home and farm where the goat cheese was produced and stored and no other places. Further, regulations prohibit night and holiday inspections See id. (access by Commissioner and his agents limited to "reasonable hours").

In sum, the goat cheese production and storage areas at Satyrfield Farm were subject to a warrantless inspection. Solem refused entry to the inspectors in

violation of Code sec. 3.1-388(e). Therefore, the search warrant stated a valid offense.[2]

II. THE WARRANT WAS ISSUED UPON PROBABLE CAUSE

Next, Solem and Coles contend the search warrant was issued without probable cause. We disagree.

Whether probable cause exists to support the issuance of a warrant is to be determined from the "totality of the circumstances" that are presented to the magistrate. Illinois v. Gates, 462 U.S. 213, 238 (1983).

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2. Moreover, the procedure followed by the Department in this case was exactly that prescribed by the United States Supreme Court in Camara. "Warrants should normally be sought only after entry is refused..." Camara, 387 U.S. at 539. When Solem refused a warrantless inspection under Code sec. 3.1-399, the Department's agents properly applied for a search warrant, which was granted. The evidence, to which the motion to suppress was directed, came not from a warrantless inspection, but from a validly issued search warrant.

> The task of the issuing magistrate is simply to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for... concluding" that probable cause existed.
>
> *******
>
> [A]n after-the-fact review of a magistrate's decision should not be made de novo[,]... great deference should be given to the magistrate's finding of probable cause.

Derr v. Commonwealth, 242 Va. 413, 421, 410 S.E.2d 662, 666 (1991) (quoting Gates, 462 U.S. at 238).

In this case, the magistrate was informed that agents of the Department observed Coles sell goat cheese in a public market on June 19, 1999; that the goat cheese was being sold without prior inspection by the Department, in violation of Code sec. 3.1-398.1; that

Coles resided at Satyrfield Farm and that agents of the Department had been refused entry to inspect Satyrfield Farm. These facts provided the magistrate with probable cause to believe Satyrfield Farm was subject to inspection and entry had been denied in violation of Code sec. 3.1-388(e). The things to be searched would provide evidence that Satyrfield Farm was producing goat cheese for sale to the public and was, therefore, subject to inspection which should not have been refused.

We, therefore, find the search warrant was based on probable cause.

IV. THE WARRANT WAS NOT BASED ON ILLEGALLY OBTAINED OBSERVATIONS

Lastly, Solem and Coles contend the evidence should have been suppressed because the search warrant was based, in part, on observations illegally made by Agent Williams. The observations

they challenge are those describing their home as "[a] faded masonite board two story residence and surrounding barns." It is their contention that Williams was illegally upon their property when he made these observations and these observations tainted the search warrant. We disagree with the contention that Williams' observation of the structures required the suppression of evidence.

As we have stated, Satyrfield Farm was subject to inspection as a food production and storage site. Williams, an agent of the Commissioner, drove to the farm and walked from his car to the front door to perform the requisite inspection pursuant to Code sec. 3.1-399. He was therefore lawfully on the property. Solem and Coles "had no reasonable expectation of privacy in those areas of their property observable by members of the public who might approach their

residence... or lawfully be upon their property." Shaver v. Commonwealth, 30 Va.App. 789, 796, 520 S.E.2d 393, 396 (1999). Williams' observation of the design of the house and the presence of a barn were made while walking the distance from his car to the front door and back again when Solem refused entry. Williams therefore did not perform an illegal search that tainted the search warrant when his description of the house and barn were used in the affidavit.

Further, neither the observations regarding the style of the house at Satyrfield Farm nor the fact that Williams actually observed a barn on the farm provided a basis upon which the warrant was issued. The observations simply added a more definitive description to the places sought to be searched, and without that information the warrant would still have been issued

as the observations had nothing to do with an alleged offense and added nothing to the Department's allegations.

Accordingly, we find the trial court did not err when it denied Solem's and Coles' motions to suppress. The convictions are affirmed.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 16th day of January, 2003.

Christine Solem and
John Coles, Appellants,

against Record No. 1618-01-2
Circuit Court Nos. CR14,051, CR14,052, CR14,061, CR14,062

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing

Before Judges Humphreys, Clements and Agee

On Consideration of the petition of the appellants to set aside the judgment rendered herein on the 15th day of October, 2002 and grant a rehearing thereof, the said petition is denied.

A copy,
Teste:
Cynthia L. McCoy, Clerk

By: [signed]

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 16th day of January, 2003.

Christine Solem and
John Coles, Appellants,

against Record No. 1618-01-2
Circuit Court Nos. CR14,051, CR14,052, CR14,061, CR14,062

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing En Banc

Before the Full Court

On Consideration of the petition of the appellants to set aside the judgment rendered herein on the 15th day of October, 2002 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate

to grant the petition for rehearing en banc in this case. Code sec. 17.1-402(D).

A copy,
Teste:
Cynthia L. McCoy, Clerk

By: [signed]

Deputy Clerk

COMMONWEALTH OF VIRGINIA

Sixteenth Judicial Circuit

November 29, 2000

Steven T. Buck, Esquire
Assistant Commonwealth's Attorney
County of Albemarle
410 East High Street
Charlottesville, Virginia 22902

Christine Solem
1836 Polo Grounds Road
Charlottesville, Virginia 22911

RE: Commonwealth v. Christine Solem
Commonwealth v. John Coles
Case Nos. CR14,051,
CR14,052, CR14,061, CR14,062

Dear Mr. Buck and Ms. Solem:

The Court has considered the motions filed in these cases, the evidence and the arguments of the Commonwealth and Ms. Solem. After a review of the law and the evidence the Court will overrule the motions and set the cases for trial if the Commonwealth be so advised.

Very truly yours,
[signed]

Rayner v. Snead
Judge Designate

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF.

PRESENT: HON. RAYNER V. SNEAD

COMMONWEALTH OF VIRGINIA

v. Appeal No. CR14,051, CR14,052, CR14,061, CR14,062

CHRISTINE SOLEM
JOHN COLES

As stated in the Court's letter dated November 29, 2000, the defendant's motions are overruled.

ENTER: [signed] Paul M. Peatross, Jr., Judge
Honorable Paul M. Peatross, Jr.
for Honorable Rayner v. Snead

DATE: 10-30-01
nunc pro tunc to November 29, 2000

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE:

Virginia Code ["V.C."] section ["sec."] 3.1-399,* "The Commissioner, acting through his duly authorized agents, shall have free access at all reasonable hours to any factory, warehouse, or establishment in which foods are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods in commerce, or any store, restaurant or other place in which food is being offered for sale, for the purpose:

(1) Of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of this article are being violated; and

(2) Of securing samples or specimens of any food after paying or offering to pay for such sample. It shall be the

duty of the Commissioner to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of this article is being violated." (Code 1950, sec. 3-319; 1966, c. 702.)

*This sec. was amended by c. 420 in 2003, to add as a last paragraph, "This section shall not apply to nonprofit organizations holding one-day food sales."

V.C. sec. 3.1-398.1, "No person shall operate a food manufacturing plant, food storage warehouse, or retail food store until it has been inspected by the Commissioner. This section shall not apply to food manufacturing plants operating under a grant on inspection from the Bureau of Meat and Poultry Inspection or

a permit from the Bureau of Dairy Services of the Virginia Department of Agriculture and Consumer Services and Grade A fluid milk manufacturing plants and shellfish and crustacea processing plants operating under a permit from the Virginia Department of Health." (1993, c. 936.)

V.C. sec. 3.1-418, "Any manufacturer, dealer or person who refuses to comply upon demand with the requirements of Chapters 20, 21, 30, and 33 of this title or who shall impede, obstruct, hinder or otherwise prevent or attempt to prevent any chemist inspector or other person in the performance of his duty in connection with such chapters, shall be guilty of a misdemeanor, and, unless otherwise specified, upon conviction be fined not less than $10 nor more than $100, or be imprisoned not more than 100 days, or both,

in the discretion of the court; and such fines, less the legal costs, shall be paid into the state treasury." (Code 1950, sec. 3-339; 1966, c. 702.)

V.C. sec. 17.1-410., "A....

When the Court of Appeals has... (iii) decided an appeal, its decision shall be final, without appeal to the Supreme Court, in:

1. Traffic infraction and misdemeanor cases where no incarceration is imposed;...

B. Notwithstanding the provisions of subsection A, in any case other than an appeal pursuant to sec. 19.2-398, in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in

the Supreme Court in accordance with the provisions of sec. 17.1-411."

V.C. sec. 19.2-52. "Except as provided in sec. 19.2-56.1, search warrants, based upon complaint on oath supported by an affidavit as required in sec. 19.2-54, may be issued by any judge, magistrate or other person having authority to issue criminal warrants, if he be satisfied from such complaint and affidavit that there is reasonable and probable cause for the issuance of such search warrant."

V.C. sec. 19.2-53. "Search warrants may be issued for the search of or for specified places, things or persons, and seizure therefrom of the following things as specified in the warrant:

(1) Weapons or other objects used in the commission of crime;

(2) Articles or things the sale or

possession of which is unlawful;

(3) Stolen property or the fruits of any crime;

(4) Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime. Notwithstanding any other provision in this chapter to the contrary, no search warrant may be issued as a substitute for a witness subpoena."

V.C. sec. 19.2-54. "No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in

relation to which such search is to be made and that the object, thing, or person searched for constitutes evidence of the commission of such offense...

No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. The term "affidavit" as used in this section, means statements made under oath or affirmation and preserved verbatim..."

V.C. sec. 19.2-56. "The judge, magistrate or other official authorized to issue criminal warrants, shall issue a search warrant if he finds from the facts or circumstances recited in the affidavit that there is probable cause for the issuance thereof.

Every search warrant shall be directed to (i) the sheriff, sergeant, or any

policeman of the county, city or town in which the place to be searched is located, (ii) any law-enforcement officer or agent employed by the Commonwealth and vested with the powers of sheriffs and police, or (iii) jointly to any such sheriff, sergeant, policeman or law-enforcement officer or agent and an agent or officer of the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury or the Drug Enforcement Administration. The warrant shall (i) name the affiant, (ii) recite the offense in relation to which the search is to be made, (iii) name or describe the place to be searched, (iv) describe the property or person to be searched for, and (v) recite that the magistrate has found probable cause to believe that the property or person constitutes evidence of a crime (identified in the warrant) or

tends to show that a person (named or described therein) has committed or is committing a crime.

The warrant shall command that the place be forthwith searched, either in day or night, and that the objects or persons described in the warrant, if found there, be seized. An inventory shall be produced before a court having jurisdiction of the offense in relation to which the warrant was issued as provided in sec. 19.2-57.

Any such warrant as provided in this section shall be executed by the policeman or other law-enforcement officer or agent into whose hands it shall come or be delivered. If the warrant is directed jointly to a sheriff, sergeant, policeman or law-enforcement officer or agent of the Commonwealth and a federal agent or officer as otherwise provided in this section, the warrant may be executed

jointly or by the policeman, law-enforcement officer or agent into whose hands it is delivered. No other person may be permitted to be present during or participate in the execution of a warrant to search a place except (i) the owners and occupants of the place to be searched when permitted to be present by the officer in charge of the conduct of the search and (ii) persons designated by the officer in charge of the conduct of the search to assist or provide expertise in the conduct of the search.

Every search warrant shall contain the date and time it was issued...

The judge, magistrate, or other official authorized to issue criminal warrants shall attach a copy of the affidavit required by sec. 19.2-54, which shall become a part of the search warrant and served therewith..."

V.C. sec. 19.2-59. "No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages..."

V.C. sec. 19.2-393. "An '<u>inspection warrant</u>' is an order in writing, made in the name of the Commonwealth, signed by any judge of the circuit court whose territorial jurisdiction encompasses the property or premises to be inspected or entered, and directed to a state or local

official, commanding him to enter and conduct an inspection, testing or collection of samples for testing required or authorized by state or local law or regulation in connection with the manufacturing, emitting or presence of a toxic substance, and which describes, either directly or by reference to any accompanying or attached supporting affidavit, the property or premises where the inspection, testing or collection of samples for testing is to occur. Such warrant shall be sufficiently accurate in description so that the official executing the warrant and the owner or custodian of the property or premises can reasonably determine from the warrant the activity, condition, circumstance, object or property of which inspection, testing or collection of samples for testing is authorized.

For the purposes of this chapter,

'manufacturing' means producing, formulating, packaging, or diluting any substance for commercial sale or resale; 'emitting' means the release of any substance, whether or not intentional or avoidable, into the work environment, into the air, into the water, or otherwise into the human environment; and 'toxic substance means any substance, including (i) any raw material, intermediate product, catalyst, final product and by-product of any operation conducted in a commercial establishment and (ii) any biological organism, that has the capacity, through its physical, chemical, or biological properties, to pose a substantial risk to humans, aquatic organisms or any other animals of illness, death or impairment of normal functions, either immediately or over a period of time." (1976, c. 625; 1979 c. 122.).

V.C. sec. 19.2-394. "An inspection warrant may be issued for any inspection, testing or collection of samples for testing or for any administrative search authorized by state or local law or regulation in connection with the presence, manufacturing or emitting of toxic substances, whether or not such warrant be constitutionally required. Nothing in this chapter shall be construed to require issuance of an inspection warrant where a warrant is not constitutionally required or to exclude any other lawful means of search, inspection, testing or collection of samples for testing, whether without warrant or pursuant to a search warrant issued under any other provision of the Code of Virginia. No inspection warrant shall be issued pursuant to this chapter except upon probable cause, supported by affidavit,

particularly describing the place, things or persons to be inspected or tested and the purpose for which the inspection, testing or collection of samples for testing is to be made. Probable cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting such inspection, testing or collection of samples for testing are satisfied with respect to the particular place, things or persons or there exists probable cause to believe that there is a condition, object, activity or circumstance which legally justifies such inspection, testing or collection of samples for testing. The supporting affidavit shall contain either a statement that consent to inspect, test or collect samples for testing has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent in order to

enforce effectively the state or local law or regulation which authorizes such inspection, testing or collection of samples for testing. The issuing judge may examine the affiant under oath or affirmation to verify the accuracy of any matter indicated by the statement in the affidavit." (1976, c. 625; 1979, c. 122.)

V.C. sec. 19.2-395. "An inspection warrant shall be effective for the time specified therein, for a period of not more than ten days, unless extended or renewed by the judicial officer who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such warrant shall be executed and returned to the judicial officer by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of

such time, the warrant, unless executed shall be void." (1976, c. 625).

V. C. sec. 19.2-396. "An inspection, testing or collection of samples for testing pursuant to such warrant may not be made in the absence of the owner, custodian or possessor of the particular place, things or persons unless specifically authorized by the issuing judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the law or regulation being enforced. An entry pursuant to this warrant shall not be made forcibly, except that the issuing judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of an immediate threat to public health or safety, or where facts are shown establishing that reasonable attempts to serve a previous

warrant have been unsuccessful. In the case of entry into a dwelling, prior consent must be sought and refused and notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, unless the issuing judge finds that failure to seek consent is justified and that there is a reasonable suspicion of an immediate threat to public health or safety." (1976, c. 625; 1979, c. 122.)

V.C. sec. 19.2-397. "Any person who willfully refuses to permit an inspection, testing or collection of samples for testing lawfully authorized by warrant issued pursuant to this chapter shall be guilty of a Class 3 misdemeanor." (1976, c. 625; 1979, c. 122.)

V.C. sec. 3.1-395. "A food shall be deemed to be adulterated:

(a)(1) If it bears or contains any

poisonous or deleterious substance which may render it injurious to health...; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of sec. 3.1-397; (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or it is otherwise unfit for food; (4) if it has been produced, prepared packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health; (5) if it is the product of a diseased animal...; or (6) if its container is composed in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health..." (Code 1950, sec. 3-315; 1966, c. 702; 1988, c. 110.)

VIRGINIA: IN THE CIRCUIT COURT FOR THE

COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA,
Plaintiff

v. Case Nos. CR 00014051;
CR 00014052

CHRISTINE SOLEM,
Defendant

MOTION TO SUPPRESS

Comes now the defendant, Christine Solem, and moves the Court, under sec. 19.2-266.2 of the Code of Virginia to suppress the evidence in the above cases on the following grounds:

1. Defendant/Solem has made goat cheese from the milk of her own goats at her farm since 1979, and has sold the cheese openly at the Charlottesville Farmers' Market on Saturday, April thru October since 1990, after conferring with an attorney that such sales were allowed as no regulations or permits existed for

the manufacture of goat cheese.

2. Solem attended the February 15, 1996 Virginia Department of Agriculture and Consumer Services' Board meeting and confirmed that farmers were not forbidden by law at this time to sell goat cheese direct to consumers at the farm or at farmers' markets provided, pursuant to sec. 3.1-383 of the Code of Virginia, that such cheese was not "prepared, handled or kept where the sanitary conditions are such that the article is rendered unhealthy, unwholesome, deleterious or otherwise unfit for human food...".

3. Since 1997 Solem has had a running dispute, which became increasingly irate, with the Department concerning their sudden application of the Virginia Food Laws to farmers selling their homemade cheese direct to consumers either at the farm or at farmers' markets.

4. July 12, 1998 Solem wrote a culminating letter to the Department denying the Commissioner of his agents permission to enter her farm or home without a warrant. A copy of this letter is attached to this Motion as Exhibit "A."

5. On June 22, 199 Defendant/Solem was home alone in the middle of an exercise tape and scantily clad when, without notice and without warrant, food inspectors Ollinger and Williams from the Virginia Department of Agriculture and Consumer Services knocked on the door and demanded entry to inspect.

6. When asked by Solem if there had been a complaint about her cheese, inspector Ollinger replied that there had been none. Defendant/Solem forbade them to enter.

7. Solem was forced to step outside to ensure that the inspectors would not

enter. She argued with inspector Williams about whether or not her home and farm was a "food establishment" or food manufacturing plant requiring inspection.

8. Inspector Williams informed Solem that refusal of entry was a misdemeanor. Solem responded that they could go ahead and prosecute her for that and then the whole matter could be settled.

9. The inspectors dallied and looked around the curtilage area of the house and Solem had to reiterate that they would have to leave.

10. Inspectors Ollinger and Williams arrived about three hours later with a search warrant and accompanied by Albemarle police officer K.E. Mansoor.

11. The affidavit for the warrant was signed by J.A. Morano, Jr., the offense described as "Refusal to permit entry of agents of the Commissioner of Agriculture and Consumer Services for the purpose of

inspection and the taking of a food sample, Va. Code sec. 3.1-388(e)". A copy of the affidavit is attached hereto as Exhibit "B," and a copy of the search warrant as Exhibit "C."

12. However, refusal to allow State agents to enter one's home without a warrant is not an "offense." This matter has long ago been established by the Supreme Court of the United States in the 1967 case of Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523.

13. Even if such were an "offense," there is no relationship between the items to be searched for as described which would constitute such an "offense."

14. Neither is there a relationship between the material facts constituting probable cause that the search should be made and the "offense" nor the items to be searched for as described.

15. Both the warrant and its underlying affidavit are so facially deficient and lacking in indicia of probable cause so as to render official belief in their existence entirely unreasonable.

16. In addition, Section 2 of the affidavit describing the place, person or thing to be searched was simply a bare bones conclusion of the affiant. Defendant's home cannot be seen from the public road. The agents preliminary entry (<u>without a warrant</u>) of Solem's farm could have afforded them the opportunity to observe buildings etc., but since they entered none of these buildings, such statements as to what the buildings are used for are just assumptions. The magistrate has served as merely a rubber stamp for the affiant's conclusions.

17. The State agents bootstrapped their way into Solem's home by taking

calculated steps to procure the warrant through reckless falsity and omissions which misled the magistrate. For instance, the affiant has admitted that he did not inform the magistrate that "this is a private home."

18. For all the above reasons Defendant/Solem moves this Court to suppress the evidence collected under the warrant executed June 22, 1999 for Case Nos. CR 00014051 and CR 00014052, as the State officials' actions in procuring the warrant, the warrant itself, and the subsequent search, exhibit flagrantly abusive violations of Defendant/Solem's Fourth Amendment rights.

Respectfully submitted,
[signed]
Christine Solem, pro se
1836 Polo Grounds Road
Charlottesville, VA 22911

* * *

SEARCH INVENTORY AND RETURN

The following items, and no others, were seized under the authority of this warrant:

1. 2 separate containers of plain goat cheese...
2. 1 container of scallion goat cheese...
3. 3 containers of plain goat cheese...
4. 1 plastic sealed container of well water... from kitchen sink.

The statement above is true and accurate to the best of my knowledge and belief.
6/22/99 K. E. Mansoor

_____
Executing officer

Execution

Executed by searching the within described place, person or thing.
6/22/99 1537 hours

_____
Date and time executed

K. E. Mansoor

_____
Executing officer

VIRGINIA: IN THE CIRCUIT COURT FOR THE

COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA,
Plaintiff

v. Case Nos. CR 00014061;
CR 00014062

JOHN COLES,
Defendant

MOTION TO SUPPRESS

Comes now the defendant, John Coles, and moves the Court, under sec. 19.2-266.2 of the Code of Virginia to suppress the evidence in the above styled cases on the following grounds:

1. I reside in the house at Satyr-field Farm which was described on June 22, 1999, and therefore have standing in this matter.

2. I concur with the grounds for suppression of evidence presented in Co-defendant, Christine Solem's Motion to Suppress filed in Case Nos. CR 00014051

and CR 00014052, filed this same day. April 17, 2000, and move the Court to suppress the evidence in Case Nos. CR 00014061 and CR 00014062 as well on the same stated grounds.

Respectfully submitted,
[signed]
John Coles, pro se
1836 Polo Grounds Road
Charlottesville, VA 22911

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE
COMMONWEALTH OF VIRGINIA,
Plaintiff

v. Case Nos. CR 00014051;
CR 00014052

CHRISTINE SOLEM,
Defendant

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

Comes now the defendant, Christine Solem, and states the following in support of her Motion to Suppress:

STATEMENT OF FACTS

* * *

ARGUMENT

WARRANT FACIALLY DEFICIENT, LACKING IN PROBABLE CAUSE

* * *

The controlling case here is Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), which states at 540,

"... appellant has been charged with

> a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access... we therefore conclude that appellant may not constitutionally be convicted for refusing consent to the inspection."

It thus follows that if one cannot constitutionally be convicted of an action, then that action could not properly be deemed an "offense."

* * *

LEON GOOD FAITH-EXCEPTION NOT APPLICABLE.

* * *

Respectfully submitted,
[signed]
Christine Solem, pro se
1836 Polo Grounds Road
Charlottesville, VA 22911

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE
COMMONWEALTH, Plaintiff

v. Case Nos. CR 00014051;
CR 00014052;
CR 00014061;
CR 00014062;

CHRISTINE SOLEM,
Defendant

TRANSCRIPT OF HEARING ON MOTIONS, INCLUDING MOTION TO SUPPRESS, Taken on August 29, 2000, and August 30, 2000

* * *

Ms. Solem: All right. I would like to introduce them at this time. All right. Here is the affidavit and here is the search warrant.

(Defendant's Exhibit Number 1 and 2, Affidavit and Search Warrant, marked and received into evidence.)

* * *

DIRECT EXAMINATION

BY MS. SOLEM:

MS. SOLEM: I was doing an exercise tape on the morning of June 22nd in my

home, in which I live and dwell. I sleep, I eat there. We make goat cheese and we are a diversified small farm.

THE COURT: Who is we?

MS. SOLEM: My partner, John Coles and myself, Christine Solem. On that morning, I heard a banging at the door, at the kitchen door, and I went to the door immediately and the two agents for the Commonwealth flashed the badges in my face and said we're here to inspect your kitchen. And I stepped outside. I felt if I didn't that they would force their way into my home.

MR. BUCK: Objection to what she conjectured, You Honor.

THE COURT: Sustained.

MS. SOLEM: Note my objection to the exception. So I walked - I stepped outside and they said they were her to inspect my kitchen, because I am not a food manufacturing plant, a retail food

store or a food storage warehouse, and inspections are not required under the code for those items. Heretofore, I has sent a letter to the Virginia Department of Agriculture and Consumer Services, there has been quite a controversy concerning the inspection of my home, inspections of anyone... But I stated they did not have permission to come in.

* * *

MS. SOLEM: My home is not in plain view. As I stated in my argument, it cannot be seen from the road.

* * *

MS. SOLEM: After the agents were refused entry we argued - well before the agents were refused entry, we argued over questions of law, and then I said I'm sorry, I cannot give you permission to enter, because there was no warrant. I also asked them if there was a complaint about my cheese and they responded no,

there was no complaint... And I had to reiterate, I'm sorry, you must leave. In which case, they finally left.

***

CROSS EXAMINATION

BY MR. BUCK:

Q So it's your testimony that you make goat cheese at this - at this location, correct?

A Yes.

Q And that's goat cheese that's offered for sale both at your residence and at the Farmer's Market in Charlottesville, correct?

A That's correct.

Q All right. And that is goat cheese that you have been offering for sale in that manner for how many years?

A Twenty years.

* * *

Q Okay. And what was that goat cheese

for, ma'am?

A I eat some of it.

***

Q Where is [the goat cheese] kept?

A In a refrigerator.

Q In your home?

A Yes.

* * *

GERALD WILLIAMS, having been duly sworn, called on behalf of the Commonwealth, testified as follows:

DIRECT EXAMINATION

* * *

CROSS EXAMINATION

* * *

Q Was there any complaint with regards to my cheese?

A No, ma'am.

* * *

Q When you entered - when you knocked on the door the first time, what did I have on?

A I remember a black sweater or black leotard and you said you had been exercising.

* * *

THE COURT: All right. Let me hear from the Commonwealth Attorney.

MR. BUCK: Yes, Your Honor. Counsel's arguments, numerous that they be, boil down to a couple main points. One is her contention that if the Virginia Statutory scheme does not require a license, it does not - it cannot allow for warrantless searches and seizures and there is no case either constitutional or under Virginia... that holds that. They - the Virginia Legislature has not seen fit to require licensure under the statutes at issue but it has seen fit to allow for warrantless searches and seizures to those involved in a systematic business enterprise that involves the distribution

of food.

* * *

COURT OF APPEALS OF VIRGINIA

CHRISTINE SOLEM, ET AL. V. COMMONWEALTH OF VIRGINIA
Record No. 1618-01-2

PETITION FOR APPEAL

Christine Solem/John Coles, pro se
1836 Polo Grounds Road
Charlottesville, VA 22911

* * *

SUBJECT INDEX

TABLE OF CITATIONS.....i

STATEMENT OF CASE.....1

QUESTIONS PRESENTED.....2

STATEMENT OF FACTS.....2

ARGUMENT.....4

I. THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANTS' MOTIONS TO SUPPRESS AND ALLOWED ILLEGAL EVIDENCE PROCURED IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO BE PRESENTED AT TRIAL.....4

A. Warrant Does not Recite Valid Offense.....4

B. Warrant/Affidavit Lacking in Probable Cause, Facial Cohesion.....5

C. Observations Used for Search Warrant Procurement Obtained Illegally.....7

D. Leon Good-Faith Exception Not Applicable.....9

CONCLUSION.....11

* * *

Respectfully submitted,
[signed]
Christine Solem/John Coles, pro se
1836 Polo Grounds Road
Charlottesville, VA 22911

* * *

IN THE SUPREME COURT OF
VIRGINIA

CHRISTINE SOLEM and JOHN COLES,
Appellants

ads.

COMMONWEALTH OF VIRGINIA,
Appellee

Court of Appeals Record No. 1618-01-2

APPELLANTS' PETITION FOR APPEAL

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902-5135
(434) 979-8159
fax (434) 979-8152
Counsel for Appellants

* * *

EVEN IF THE MAGISTRATE DID NOT ERR AS A MATTER OF LAW IN ISSUING THE WARRANT IN RELATION TO 3.1-399, THERE WAS AN UTTER ABSENCE OF ANY EVIDENCE FROM WHICH A REASONABLE MAGISTRATE COULD CONCLUDE PROBABLE CAUSE TO BELIEVE THE EQUIPMENT WOULD BE EVIDENCE OF A 3.1-399 VIOLATION.

In any event, the affidavit is still "bare bones" as to a 3.1-399 violation. First, there is no express assertion of any refusal, nor can one be implied. The affidavit says "without being inspected... as required by" 3.1-398.1. Assuming that assertion can be applied to 1836 Polo Grounds Rd., as opposed to "without being inspected at the Charlottesville Farmers Market," a dubitable proposition at best, this is wholly the affiant's conclusory opinion. The affiant has his opinion that the place is being operated in violation of that Code section.

And operating without being inspected under a different code section is no more a refusal in violation of 3.1-388(e) than is driving without a driver's license driving on a suspended license. There cannot be a "refusal" offense without a refusal any more than there can be a murder offense without a murder.

Further, to "refuse" there must be a demand for entry, and there is no evidence of a demand for entry. Since it contains no allegation of demand for entry, it contains no allegation the demand was by a VDACS agent, be it Williams or anybody else, or that the demand for entry was to perform a 3.1-399 inspection. Also, since it contains no allegation of demand and refusal, it contains no allegation that the refusal was at a

requisite place.

Thus, the core elements of a 3.1-399 violation, (1) a demand for entry (2) by an agent of the Commissioner of Agriculture (3) for the purpose of a 3.1-399 inspection, (4) a refusal, and (5) that the place at which the refusal occurred is a requisite place are wholly lacking. In fact, the only evidence that affiant has made any effort to present is the supposed inference from Coles selling goats cheese at the Farmers' Market to the fact he is operating a goat cheese operation out of his home.

That the affidavit is not only so "bare bones" as to be defective, but so bare bones as to lead to suppression under Leon can be seen from the following.

* * *

Furthermore, even if the affidavit had alleged a "refusal,"

> It was error for the magistrate to consider the Gardners' refusal to consent to a search of their residence as part of the basis for the issuance of the search warrant in this case. Refusing consent to search was the Gardners' right, and "[w]e decline to view the exercise of a constitutional right as a factor in determining probable cause." Thus, the trial court's determination that refusal to consent to a search may be taken into account when determining probable cause is error as a matter of law.

Gardner v. State, 566 S.E.2d 329, 332 (Ga. App. 2002). So, here, the panel erred as a matter of law in stating when agents "had been refused entry," such fact provided probable cause. (Op. 7).

* * *

THE AFFIDAVIT IS UTTERLY LACKING IN EVIDENCE FROM WHICH A MAGISTRATE COULD CONCLUDE THE EQUIPMENT WOULD BE EVIDENCE OF A SEC. 3.1-398.1 VIOLATION.

THE WARRANT WAS INVALID

Respectfully submitted,

CHRISTINE SOLEM AND JOHN COLES

By counsel

[signed]

Norman Lamson
405 8th Street, N. E.
Charlottesville, VA 22902
(434) 979-8159
fax (434) 979-8152

SUMMONS

Albemarle County
[X] General District Court
* * *

TO THE ACCUSED:

You are hereby commanded to appear before this Court on _____ to answer the charge that on or about June 22, 1999, within this ... [X] County you did unlawfully Fail to securely protect food in the process of manufacture or storage from contamination by flies, dust, dirt or other injurious contamination.
in violation of Section 3.1-368 [X] Code of Virginia.

* * *

I, the undersigned have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of G. W. Williams, Food Inspector, VA Dept. of Agriculture and Consumer Services.

14:50 July 27, 1999

_____ _____
Date and time issued Magistrate

_____

ACCUSED:

Coles John, Owner/Operator
Satyrfield Goat Farm
1836 Polo Grounds Rd.
Charlottesville, VA 22911

* * *

[X] Commonwealth of Virginia

SUMMONS

Albemarle County
[X] General District Court
* * *

TO THE ACCUSED:

You are hereby commanded to appear before this Court on _____ to answer the charge that on or about June 22, 1999, within this ... [X] County you did unlawfully Manufacture, sell, or deliver, hold or offer for sale food that is adulterated.

TO WIT: Produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth or rendered unwholesome or injurious to health.

in violation of Section 3.1-388(a) [X] Code of Virginia.

* * *

I, the undersigned have found probable cause to believe that the Accused committed the offense charged, based on the

sworn statements of G. W. Williams, Food Inspector, VA Dept. of Agriculture and Consumer Services.

14:56 July 27, 1999

_____ _____
Date and time issued Magistrate

_____

_____

ACCUSED:

Coles John, Owner/Operator
Satyrfield Goat Farm
1836 Polo Grounds Rd.
Charlottesville, VA 22911

* * *

[X] Commonwealth of Virginia

SUMMONS

Albemarle County
[X] General District Court
* * *

TO THE ACCUSED:

You are hereby commanded to appear before this Court on _____ to answer the charge that on or about June 22, 1999, within this ... [X] County you did unlawfully Fail to securely protect food in the process of manufacture or storage from contamination by flies, dust, dirt or other injurious contamination.
in violation of Section 3.1-368 [X] Code of Virginia.

* * *

I, the undersigned have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of G. W. Williams, Food Inspector, VA Dept. of Agriculture and Consumer Services.

14:57 July 27, 1999

_____ _____
Date and time issued Magistrate

_____

ACCUSED:

Solem, Christine, Owner/Operator
Satyrfield Goat Farm
1836 Polo Grounds Rd.
Charlottesville, VA 22911

* * *

[X] Commonwealth of Virginia

SUMMONS

Albemarle County
[X] General District Court
* * *

TO THE ACCUSED:

You are hereby commanded to appear before this Court on _____ to answer the charge that on or about June 22, 1999, within this ... [X] County you did unlawfully Manufacture, sell, or deliver, hold or offer for sale food that is adulterated.

TO WIT: Produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth or rendered unwholesome or injurious to health.

in violation of Section 3.1-388(a) [X] Code of Virginia.

* * *

I, the undersigned have found probable cause to believe that the Accused committed the offense charged, based on the

sworn statements of G. W. Williams, Food Inspector, VA Dept. of Agriculture and Consumer Services.

15:02 July 27, 1999 _____

Date and time issued Magistrate

_____

ACCUSED:

Solem, Christine, Owner/Operator
Satyrfield Goat Farm
1836 Polo Grounds Rd.
Charlottesville, VA 22911

* * *

[X] Commonwealth of Virginia